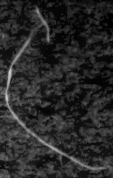


No. [redacted]

[redacted]

Petitioner

vs.

STATE OF ALABAMA,

Respondent

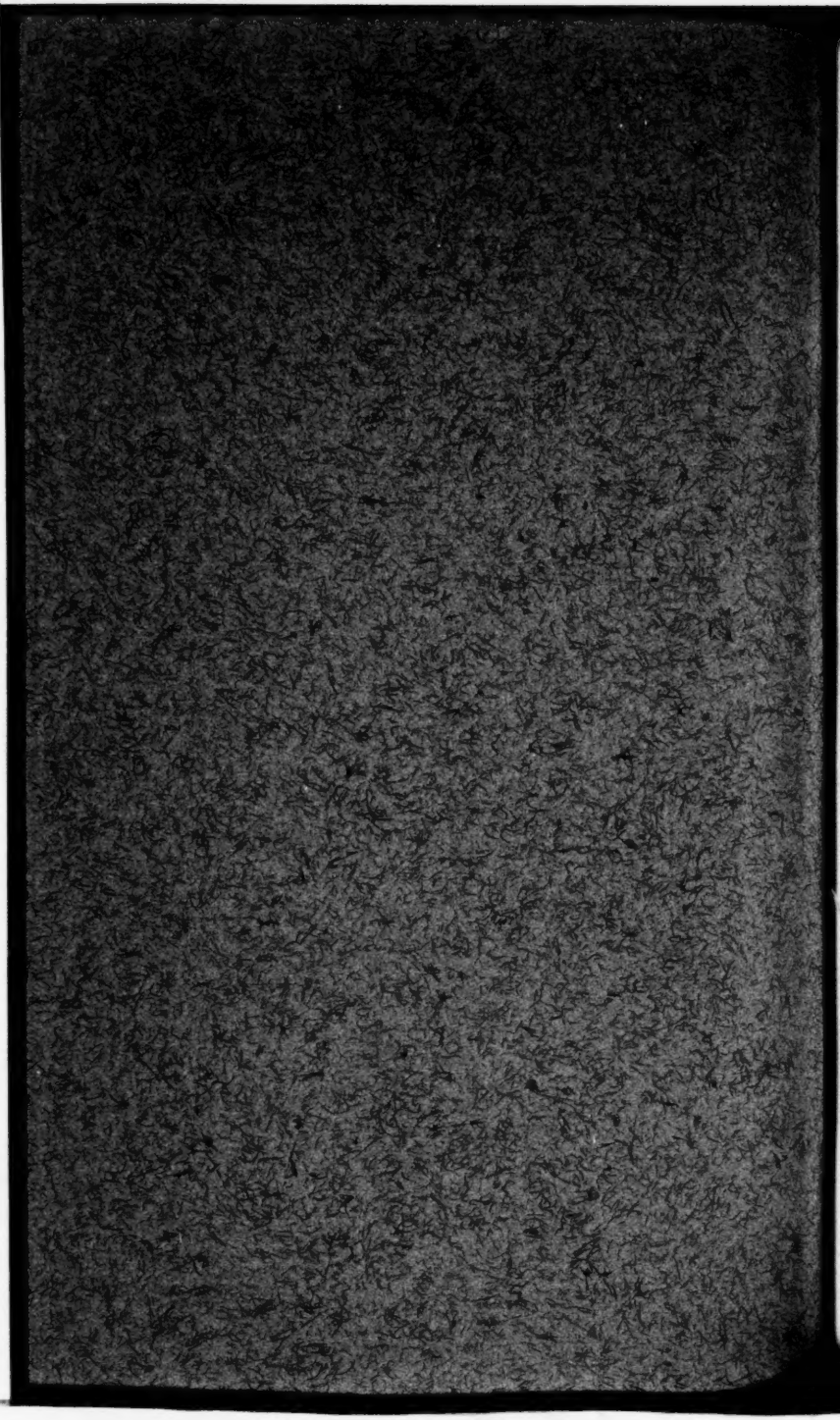
BRIEF AND ARGUMENT

IN OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI

A. G. GARDNER,
Attorney General of Alabama,
Counsel for Respondent

JAMES T. HARDIN,
Assistant Attorney General,
On The Brief



INDEX

SUBJECT INDEX

Page

Opinions of the Court below 1

Jurisdiction 2

Issue 2

Statement of the Case 3

Brief and Argument 12

1. The due process clause of the Fourteenth Amendment does not require the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution. 12

2. The Constitution and Statutes of the State of Alabama recognize the right of an indigent defendant to counsel and require that if a defendant is indicted for a capital offense and is unable to employ counsel the court must appoint counsel for him 13

3. The right of an accused to the assistance of counsel guaranteed him by the Fourteenth Amendment to the Constitution of the United States means that the accused is entitled to the good faith assistance of a lawyer in defending the accused against the indictment upon which he is put to trial 13

4. This petitioner was aforded effective counsel for his defense with all accustomed incidents of consultation and opportunity of prepara-

Page

tion for trial, with no infringement upon his constitutional guaranties under the Fourteenth Amendment to the Constitution of the United States 14

5. Under the laws of the State of Alabama objections going to the formation of the grand jury which presented the defendant must be made by plea in abatement before pleading not guilty, and after so pleading, any such objection is addressed to the irrevisable discretion of the trial court 14

6. Under the laws of the State of Alabama objections going to the venire of the petit jury or any member thereof must be made before entering upon the trial of the case on its merits under defendant's plea of not guilty..... 15

7. The Constitution and Statutes of the State of Alabama do not authorize the State to apply for or secure a change of venue in a criminal case, but such must be done on application, petition, or motion of the defendant, or with his consent..... 15

8. One alleging discrimination in the selection of a grand or petit jury assumes the burden of establishing such discrimination..... 16

Argument 16

Certificate 32

TABLE OF CASES CITED

Page

Adamson v. California,
332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 ..... 18, 31

Akins v. Texas,
325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 ..... 16, 29, 30

Avery v. Alabama,
308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377 ..... 14, 24, 31

Ball v. State,
42 So. 2d 626 ..... 1, 15

Bankhead v. State,
33 Ala. App. 269, 32 So. 2d 814 14

Barron v. Robinson, et al,
98 Ala. 351, 13 So. 476 15

Bellman v. Burke,
74 Fed. Supp. 86, Aff. 170 Fed. 2d 413 12

Betts v. Brady,
316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 ..... 12, 18

Brown v. Mississippi,
297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 18

Burton v. United States,
151 Fed. 2d 17, 80 U.S. App. DC 17, cert. den. 66
S. Ct. 473, 326 U.S. 789, 90 L. Ed. 479 13

Bute v. Illinois,
333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 ..... 12, 17, 18

Coates v. Lawrence,
46 Fed. Supp. 414, Aff. 131 Fed. 2d 110, cert. den.
63 S. Ct. 532, 318 U.S. 759, 87 L. Ed. 1132 ..... 12, 13, 24

Conley v. Cox,
138 Fed. 2d 786 ..... 13, 24

Diggs v. Welch,
148 Fed. 667, 80 U.S. App. DC 5, cert. den. 65 S.
Ct. 1576, 325 U.S. 889, 89 L. Ed. 2002 ..... 13, 24

Page

Ex parte, Lancaster v. State,
206 Ala. 60, 89 So. 721, 18 A.L.R. 706 ..... 15, 27

Felton v. United States,
170 Fed. 2d 153, 83 U.S. App. DC 277 ..... 13, 24

Foster, et al v. Illinois,
332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 ..... 12, 18

Fulwider v. Jacob,
221 Ala. 124,127 So. 818 15

Gilchrist v. State,
234 Ala. 73, 173 So. 651 ..... 13, 20

Glasser v. United States,
315 U.S., 60, 62 S. Ct. 457, 86 L. Ed. 680 ..... 16, 19

Hebert v. Louisiana,
272 U.S. 312, 47 S. Ct. 103, 71 L. Ed. 270 ..... 12, 16, 18

Hill v. Texas,
316 U.S. 404, 62 S. Ct. 1161, 86 L. Ed. 1559 ..... 26, 30

Holden v. Hardy,
169 U.S. 366, 18 S. Ct. 383, 42 L. Ed. 780 ..... 12, 18

Hoskins v. Hight,
95 Ala. 284, 11 So. 253 15

Hubbard v. State,
72 Ala. 164 15

Hurtado v. California,
110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 233 18

Jackson v. State,
74 Ala. 26 15

Jarvis v. State,
220 Ala. 501, 126 So. 127 14

McAdams v. State,
216 Ala. 659, 114 So. 39 14

Martin v. Texas,
200 U.S. 316, 26 S. Ct. 338, 50 L. Ed. 497 16

Page

Mitchell v. Thompson,
56 Fed. Supp. 683 ..... 14, 23

Morris v. State,
193 Ala. 1, 68 So. 1003 14

Nixon v. State,
68 Ala. 535 14

Norris v. Alabama,
294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 ..... 16, 29, 30

Palko v. Connecticut,
302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 ..... 12, 18

Patton v. Mississippi,
332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76 ..... 26, 30

Peterson v. State,
231 Ala. 625, 166 So. 20 14

Peterson v. State,
227 Ala. 361, 150 So. 156 ..... 15, 26

Powell v. Alabama,
287 U.S. 45, 53 S. Ct. 55,
77 L. Ed. 158 ..... 11, 12, 14, 18, 20, 24

Simpson v. Golden,
114 Ala. 336, 21 So. 990 15

Tarrance v. Florida,
188 U.S. 519, 23 S. Ct. 402, 47 L. Ed. 572 16

Twining v. New Jersey,
211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 18

U.S. ex rel Feely v. Regan,
166 Fed. 2d 976 13

Vernon v. State,
239 Ala. 593, 196 So. 96 14

Von Moltke v. Gillies,
332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 ..... 16, 19

STATUTES CITED

	Page
Constitution of the United States	
Sixth Amendment	**16, 18, 19, 24**
Fourteenth Amendment	**2, 6, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 29**
United States Code of Judiciary and Judicial Procedure, Title 28, Section 1257(3), Act of Congress of June 25, 1948, approved June 28, 1948	**2**
Federal Rules of Criminal Procedure, Rule #44	**18**
Constitutiona of Alabama 1901	
Article 1, Section 6	**13, 15, 20**
Article 1, Section 75	**15**
Code of Alabama 1940	
Title 15, Section 267	**15**
Title 15, Section 268	**15**
Title 15, Section 318	**13, 20**
Title 15, Section 382(1) et. seq.	**3**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO. .....

LONNIE JAMES BALL,
ALIAS, L. J. BALL,
Petitioner

VS.

STATE OF ALABAMA,
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I.

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

Lonnie J. Ball, alias, v. State of Alabama, 7th Division 972, 42 So. 2d 626. An application for rehearing in the Supreme Court of Alabama was overruled without opinion. Ex parte Lonnie Ball, alias, 7th Division 972, November 17, 1949.

II.

JURISDICTION

This petitioner has applied for writ of certiorari from the Supreme Court of the United States to review the judgment of the Supreme Court of Alabama, rendered on June 30, 1949, rehearing denied November 17, 1949, under the provisions of Title 28, United States Code, Judiciary and Judicial Procedure, approved January 28, 1948; Section 1257(3), 28 U.S.C.A. Section 1257 (3). (Petitioner's brief pages 9 and 14.)

III.

ISSUES

Petitioner in his petition and brief seeks to raise some four questions for the determination of this Court. He would allege that he has been denied that due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States in that:

(1) The trial of this petitioner was not conducted according to the due course of regular procedure provided by the law in the State of Alabama, this petitioner having been denied the effective and substantial aid of counsel upon his arraignment.

(2) Petitioner's trial was conducted in an atmosphere of local public opinion so hostile and prejudicial, biased and inflamed that petitioner could not be afforded a fair, impartial and deliberate trial, and such fact was known to petitioner's trial judge.

(3) The Supreme Court of Alabama erred in holding that petitioner was given a fair, impartial and deliberate trial.

(4) The Supreme Court of Alabama erred in holding that petitioner was not denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

The State of Alabama emphatically, categorically and explicitly denies the existence of any factual or legal basis for the above allegations.

IV.

STATEMENT OF THE CASE

This petitioner was tried and convicted in the Circuit Court of Calhoun County, Alabama, under an indictment charging him with the offense of murder in the first degree (R. p. 1). Upon conviction his punishment was fixed at death by electrocution (R. pp. 16, 17). Hence this case came to the Supreme Court of Alabama for review under the provisions of the Automatic Appeal Statutes of this State. Act No. 249, General Acts 1943, page 217; Title 15, Section 382(1) et seq., Code of Alabama 1940 (Pocket Part).

Insofar as the facts of this case are concerned, as they relate to the trial in main, we feel little could, or need be, added to those facts found set out in the opinion of the Supreme Court of Alabama rendered in this cause, which we understand is before this Honorable Court as a part of the record herein. As there indicated, the principal argument for reversal was then, and is now, directed to the refusal of the trial court to grant petitioner's amended motion for a new trial.

As regards the facts relating to the homicide itself, it is suffice to say that the uncontroverted facts disclose that upon May 7, 1948, this petitioner, Lonnie James Ball, shot and killed one Robert E. Sparks, the then Chief of

Police of Oxford, Alabama, and at the same time, and in the same affray, seriously wounded another officer by the name of Billingsley (R. pp. 29, 46, 47). The evidence indicates that the fatal shooting took place in the vicinity of a store operated by one R. C. Cobb, located in Oxford, Alabama. The testimony is to the effect that upon the late afternoon of May 7, 1948, this petitioner, in company with several other persons, arrived at Mr. Cobb's store where the automobile in which they were riding was halted near the air hose (R. pp. 19, 21); that this petitioner dismounted from the automobile and prepared to "air up" the tires of the automobile; that at this time, petitioner began cursing and berating the other members of his party (R. p. 22); that he was requested by Mr. Cobb to cease his cursing, and that he thereupon addressed vile remarks to Mr. Cobb concerning his disregard for the law (R. p. 22); that two members of petitioner's party, one man and one woman, dismounted from the automobile and attempted to place this petitioner back in the car; that petitioner struggled with these persons and disengaged himself from them, and that at about this time, a third party, one Fred Towns, appeared upon the scene and after wrestling with this petitioner managed to hold him until the deceased, Mr. Sparks, and officer Billingsley, who had been called by Mr. Cobb, arrived on the scene (R. p. 70); that these officers then took charge of petitioner and placed him in the rear seat of the automobile in which they were traveling (R. pp. 25, 26); that Mr. Sparks then returned to the group in front of the store, apparently to ascertain whether or not any other persons were involved in the difficulty, while officer Billingsley remained standing alongside the automobile in which petitioner was seated (R. p. 26); that at this moment, petitioner leaped from the automobile and seized officer Billingsley from the rear, and grasping officer Billingsley's pistol fired four bullets into the body of Mr. Sparks and a fifth bullet into the body of officer Billingsley (R. p. 27); that petitioner was then seized from the rear and disarmed, and was held a prisoner until

additional law enforcement officers arrived, whereupon petitioner was taken to the county jail by Mr. Hemphill Whiteside, the Mayor of Oxford, and another person. Mr. Sparks died shortly after the shooting, while officer Billingsley eventually recovered from his injury after long hospitalization (R. pp. 57, 58).

Petitioner's sole defense, insofar as the record indicates, was that he was so drunk he did not know what he was doing, and has no recollection of the events surrounding the tragedy (R. p. 89). In support of such allegation, petitioner sought to show by certain of his relatives and other members of his party that upon the day in question, after drinking some whiskey, the party went to the home of his brother, located some three or four miles below Oxford, where petitioner drank an unbelievable amount of home-brew, stated by petitioner and his witnesses to have been a gallon or more (R. pp. 78, 89). Petitioner further testifies that upon this particular day he has no recollection of events from sometime in the afternoon preceding the slaying until the next morning when he awoke to find himself in jail (R. p. 90). Such evidence was rebutted to a great extent by the testimony of Mr. Whiteside and other persons present as to the condition of this petitioner's sobriety (R. pp. 100, 109). It is the testimony of Mr. Whiteside that when he arrived upon the scene, almost immediately following the killing, this petitioner addressed him by name and insisted that he had not fired the fatal shots, and that petitioner likewise continued to talk with him while en route to jail, still calling him by name and discussing the slaying. This, in our judgment, disproves petitioner's story that he has no recollection of such events.

After his conviction, petitioner, through his counsel, made motion for new trial, which, after certain amendments and postponements, received a lengthy and detailed hearing, and was overruled by the trial court (R. p. 261).

Substantially the same statement of facts will be found set out in the opinion of the Supreme Court of Alabama rendered in this cause and that Court concluded that the evidence adduced presented a case for the determination of the jury, and no argument has yet been advanced to the contrary.

No question being raised as to the sufficiency of the oral instructions given the jury by the trial court or any point being made, or review sought, as to the refusal of any written requested instructions to this petitioner, and the Supreme Court of Alabama being fully persuaded that the verdict of the jury was not so decidedly contrary to the great weight of the evidence as to be wrong and unjust, said conviction was affirmed by a unanimous decision of said Court upon June 30, 1949. 42 So. 2d 626.

Turning next to those questions sought to be raised by this petitioner upon motion for new trial, we deem it well, in view of the oft-expressed opinion of this Court that in cases of this nature each must depend and decision therein turn upon the particular facts applicable thereto, that we set out in some detail the sequence of events leading up to and surrounding the indictment and trial of this petitioner. In this respect the record grows complex and prolific. In fact it is exceedingly difficult to separate the pertinent from the immaterial and to arrive at and determine the true questions presented. If this first be done, it is our contention that the issues presented for determination by this Court are considerably narrowed and not difficult of determination.

It appears from the record that upon motion for a new trial petitioner sought to raise numerous constitutional questions as to the procedure followed prior to and at the time of trial. In brief, petitioner insists that he was deprived of his constitutional guaranties under the Fourteenth Amendment to the Constitution of the United States. In support of such contention petitioner sought to raise numerous questions pertaining to his custody,

indictment, arraignment, trial, appointment of counsel and representation. These, we shall attempt to analyze and discuss, after first pointing out to this Court the facts pertinent thereto.

As we have previously noted, this offense was committed on May 7, 1948. The record indicates that upon May 21, the regular Grand Jury of Calhoun County, which Grand Jury had been organized and formed upon April 26, a date prior to the commission of this offense, indicted this petitioner for the offense of murder in the first degree (R. p. 1). The record further indicates that upon May 22, this petitioner was arraigned, and in answer to such indictment, entered a plea of not guilty and a special plea of not guilty by reason of insanity (R. p. 3). Said order of arraignment further shows that upon arraignment the petitioner was attended by counsel. The facts disclosed by the record conclusively and unequivocally show that upon June 1 (and not June 3rd as stated in brief of petitioner), the Honorable Hugh Walker was appointed to defend this petitioner, and that upon June 7 and 8, Mr. Walker did appear and defend this petitioner fully, intelligently and well, as so recognized and stated by the Supreme Court of Alabama in its opinion rendered herein. The record further indicates that at some undisclosed time, this petitioner procured the services of the law firm of Beddow and Jones of Birmingham, Alabama, and it is they who appeared for petitioner upon motion for new trial and who seek to raise all the numerous questions above mentioned. In this regard, we feel it proper to point out that the record likewise discloses that this particular law firm became interested in this case almost immediately after the perpetration of the crime.

In this regard, the record shows that as early as the 16th day of May, Mr. Beddow was in communication with the Circuit Solicitor requesting information as to a preliminary hearing for this petitioner and as to the date the Grand Jury was to meet (R. p. 250). The record

likewise discloses that members of this law firm came to Calhoun County and consulted with the family of petitioner (R. pp. 249, 250). It is likewise disclosed by the record that upon the morning of petitioner's arraignment, the now deceased trial judge, the Honorable Lamar Fields, himself called Mr. Beddow at his office in Birmingham seeking to ascertain whether or not the firm of Beddow and Jones had been employed to represent this petitioner (R. p. 251). Regarding this conversation, it is shown that the Judge was not definitely advised one way or the other, but was merely informed that this law firm was interested in the case and would perhaps appear and represent petitioner (R. pp. 147, 251). During the course of such telephone conversation, it is disclosed that the trial judge made inquiry of Mr. Beddow as to the pleas he would desire to enter upon behalf of petitioner and was informed that he would desire to enter a plea of not guilty and a special plea of not guilty by reason of insanity (R. pp. 140, 251). Absolutley no mention was made of the filing of any plea in abatement. The record at this point discloses that the trial judge then entered the courtroom and delegated Mr. Richard Emerson, a practicing attorney and City Attorney for the City of Anniston, to serve this petitioner as counsel upon arraignment and to enter such pleas for him (R. p. 140). This, Mr. Emerson did after first advising the trial judge that he could not appear and defend this petitioner upon trial. In addition to entering the pleas specified or suggested by Mr. Beddow, Mr. Emerson likewise requested of the court and was granted by the court a concession to the effect that such counsel as might appear for petitioner upon trial would be permitted to withdraw or file any additional pleas deemed necessary (R. p. 140).

The record likewise discloses that after telephone communications between the trial judge and the circuit solicitor, a conference was arranged between those officials and Mr. Beddow and Mr. Jones, to be held in Anniston upon the night of May 31, 1948 (R. p. 251). At this time, these parties, together with the county solicitor,

met in the City of Anniston and there discussed this particular case. We wish to here point out that at this time the law firm of Beddow and Jones had not accepted employment as petitioner's counsel and did not purport in any way to represent the petitioner, but that by their own statements they were merely investigating toward prospective acceptance of employment (R. p. 246). It it shown that in the course of this conference, Mr. Beddow and Mr. Jones informed the court that if he would grant unto them a continuance of at least two weeks, they might take the case. This, the trial court declined to do (R. p. 247). Such request in no sense rises to the dignity of a motion for continuance, and, in fact, at this stage of the proceedings, it would have been impossible for this particular law firm to have made such a motion inasmuch as they did not purport to represent the petitioner. (See opinion of the Supreme Court of Alabama).

In the course of the above-mentioned conference it is alleged that the county solicitor, Mr. Dormon, made a statement to the effect that a continuance should not be granted for the reason that if such continuance were granted, subsequent offenses of like nature might encourage violence. It is likewise alleged that the now deceased Judge Fields made a statement to the effect that if continuances were granted in this particular case the people of the county would march on the jail (R. p. 247). Zealous counsel for petitioner attach to such alleged statements dire and sinister motives and threats, contending that such statements show the existence of a hostile and violent attitude among the citizenry of Calhoun Couny and that mob violence was imminent. Such fears we deem ill conceived inasmuch as this record is completely barren of any testimony tending to show the existence of any such hostile atmosphere or threats of violence, and the undisputed fact is that at the time of the commission of this offense every consideration was shown this petitioner and there was absolutely no acts or threats of violence of any nature. Petitioner was never removed

from the county jail of Calhoun County and, insofar as this record indicates, no threats have ever been voiced, much less enacted, against him. Neither is there any indication that there was any necessity for additional safeguards of any nature, and indeed none were needed or required.

Following such conference and the refusal of the trial judge to grant this particular law firm additional time in which to prepare and perhaps accept employment in this case, it is shown that such firm declined to participate and, thereupon, upon the early morning of the succeeding day, June 1, 1948, the trial court delegated the Honorable Hugh Walker, likewise now deceased, the duty of defending this petitioner upon trial (R. pp. 247, 248). The record indicates that Mr. Walker consulted with petitioner, members of his family, procured witnesses and proceeded to trial some seven days later, June 7 and 8, 1948 (R. p. 157).

We consider it highly pertinent to here point out that Mr. Walker made no motion for a continuance and no motion for a change of venue, and unquestionably had such motions been made, they might properly have been overruled by the trial court. Mr. Walker did file a motion to quash the venire in this particular case, which motion is found set out upon pages 3-4 of the record, which motion by petitioner's present counsel's own admissions lacked all legal sufficiency, and was properly overruled. Likewise on motion for new trial, petitioner's present counsel sought to place in issue the alleged fact that this petitioner was held incommunicado in the jail of Calhoun County for a considerable length of time (R. pp. 203-213). On this particular point, the testimony of the Sheriff of Calhoun County is directly contradictory and states that, in fact, such did not occur (R. p. 235). Petitioner's present counsel likewise seeks to raise the new and novel question regarding the competency and legal ability of Mr. Walker, petitioner's appointed counsel at time of trial. In fact,

this seems to be the basis upon which all of petitioner's complaints rest.

We have somewhat laboriously and tediously set out all the facts pertaining to petitioner's incarceration, appointment of counsel for him, and all intervening matters associating the law firm of Beddow and Jones with this particular trial, and we feel that such is necessary for this Court to have a clear understanding of just exactly what transpired, and that once having attained such understanding, this Court will readily see the utter lack of merit in petitioner's contentions.

Here, as in our presentation of this case before the Supreme Court of Alabama, it becomes difficult to follow or understand petitioner's method of approach to this case. Admittedly, many of the questions which he seeks to now raise were not raised in the trial court. It seems to be his argument and contention that this was due to petitioner's inefficient representation therein and, apparently assuming this fact to have been established despite a total absence of facts supporting same, petitioner seeks to launch into a full exposition and seeks a full review upon those things "which might have been." As we view this particular case, the very essence thereof is the question of petitioner's representation in the trial court, and in this regard we earnestly insist that he was ably and well represented by mature, experienced and distinguished counsel, and had those matters and facts existed which petitioner now seeks to have us believe did exist, questions regarding same would have been there raised and determined. As we view this case, and as it was so considered by the Supreme Court of Alabama, petitioner herein seeks to bring this case within the principles enunciated by the Supreme Court of the United States in the case of *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527, and having so obviously failed to do so, by reason of the material differences therein in facts and applicable law, we submit that his other arguments and contentions must fall of their own weight and necessity.

V.

BRIEF AND ARGUMENT

1. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE SEVERAL STATES TO CONFORM THE PROCEDURE OF THEIR STATE CRIMINAL TRIALS TO THE PRECISE PROCEDURE OF THE FEDERAL COURTS, EVEN TO THE EXTENT THAT THE PROCEDURE OF THE FEDERAL COURTS IS PRESCRIBED BY THE FEDERAL CONSTITUTION.

Bute v. Illinois, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986;

Herbert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270;

Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;

Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595;

Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288;

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158;

Foster et al v. Illinois, 332 U. S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955,

Coates v. Lawrence, 46 Fed. Supp. 414, Aff. 131 Fed. 2d 110, cert. den. 63 S. Ct. 532, 318 U. S. 759, 87 L. Ed. 1132;

Bellman v. Burke, 74 Fed. Supp. 846, Aff. 170 Fed. 2d 413.

2. THE CONSTITUTION AND STATUTES OF THE STATE OF ALABAMA RECOGNIZE THE RIGHT OF AN INDIGENT DEFENDANT TO COUNSEL AND REQUIRE THAT IF A DEFENDANT IS INDICTED FOR A CAPITAL OFFENSE AND IS UNABLE TO EMPLOY COUNSEL THE COURT MUST APPOINT COUNSEL FOR HIM.

Article I, Section 6, Constitution of Alabama 1901;

Title 15, Section 318, Code of Alabama 1940;

Gilchrist v. State, 234 Ala. 73, 173 So. 651.

3. THE RIGHT OF AN ACCUSED TO THE ASSISTANCE OF COUNSEL GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES MEANS THAT THE ACCUSED IS ENTITLED TO THE GOOD FAITH ASSISTANCE OF A LAWYER IN DEFENDING THE ACCUSED AGAINST THE INDICTMENT UPON WHICH HE IS PUT TO TRIAL.

U. S. ex rel Feely v. Regan, 166 Fed. 2d 976;

Diggs v. Welch, 148 Fed. 667, 80 U. S. App. D. C. 5, cert. den. 65 S. Ct. 1576, 325 U. S. 889, 89 L. Ed. 2002;

Burton v. U. S., 151 Fed. 2d 17, 80 U. S. App. D. C. 17, cert. den. 66 S. Ct. 473, 326 U. S. 789, 90 L. Ed. 479;

Felton v. U. S., 170 Fed. 2d 153, 83 U. S. App. D. C. 277;

Conley v. Cox, 138 Fed. 2d 786;

Coates v. Lawrence, 46 Fed. Supp. 414, Aff. 131 Fed. 2d 110, cert. den. 63 S. Ct. 532, 318 U. S. 759, 87 L. Ed. 1132;

Mitchell v. Thompson, 56 Fed. Supp. 683;

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158.

4. THIS PETITIONER WAS AFFORDED EFFECTIVE COUNSEL FOR HIS DEFENSE WITH ALL ACCUSTOMED INCIDENTS OF CONSULTATION AND OPPORTUNITY OF PREPARATION FOR TRIAL, WITH NO INFRINGEMENT UPON HIS CONSTITUTIONAL GUARANTIES UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377;

Morris v. State, 198 Ala. 1, 68 So. 1003;

McAdams v. State, 216 Ala. 659, 114 So. 39;

Bankhead v. State, 33 Ala. App. 269, 32 So. 2d 814;

Peterson v. State, 231 Ala. 625, 166 So. 20;

Jarvis v. State, 220 Ala. 501, 126 So. 127.

5. UNDER THE LAWS OF THE STATE OF ALABAMA OBJECTIONS GOING TO THE FORMATION OF THE GRAND JURY WHICH PRESENTED THE DEFENDANT MUST BE MADE BY PLEA IN ABATEMENT BEFORE PLEADING NOT GUILTY, AND AFTER SO PLEADING, ANY SUCH OBJECTION IS ADDRESSED TO THE IRREVISABLE DISCRETION OF THE TRIAL COURT.

Vernon v. State, 239, Ala. 593, 196 So. 96;

Nixon v. State, 68 Ala. 535;

Jackson v. State, 74 Ala. 26;

Hubbard v. State, 72 Ala. 164;

Ball v. State, 42 So. 2d 626.

6. UNDER THE LAWS OF THE STATE OF ALABAMA OBJECTIONS GOING TO THE VENIRE OF THE PETIT JURY OR ANY MEMBER THEREOF MUST BE MADE BEFORE ENTERING UPON THE TRIAL OF THE CASE ON ITS MERITS UNDER DEFENDANT'S PLEA OF NOT GUILTY.

Peterson v. State, 227 Ala. 361, 150 So. 156;

Simpson v. Golden, 114 Ala. 336, 21 So. 990;

Hoskins v. Hight, 95 Ala. 284, 11 So. 253;

Barron v. Robinson et al, 98 Ala. 351, 13 So. 476

Fulwider v. Jacob, 221 Ala. 124, 127 So. 818.

7. THE CONSTITUTION AND STATUTES OF THE STATE OF ALABAMA DO NOT AUTHORIZE THE STATE TO APPLY FOR OR SECURE A CHANGE OF VENUE IN A CRIMINAL CASE, BUT SUCH MUST BE DONE ON APPLICATION, PETITION, OR MOTION OF THE DEFENDANT, OR WITH HIS CONSENT.

Article I, Sections 6 and 75, Constitution of Alabama 1901;

Title 15, Sections 267 and 268, Code of Alabama 1940;

Ex parte Lancaster v. State, 206 Ala. 60, 89 So. 721, 18 A.L.R. 706.

8. ONE ALLEGING DISCRIMINATION IN THE SELECTION OF A GRAND OR PETIT JURY ASSUMES THE BURDEN OF ESTABLISHING SUCH DISCRIMINATION.

Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692;

Tarrance v. Florida, 188 U. S. 519, 23 S. Ct. 402, 47 L. Ed. 572;

Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497;

Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074.

VI

ARGUMENT

1. We make this observation in view of the seeming importance that petitioner attaches to the decisions of this Court rendered in the cases of *Glasser v. U. S.*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, and *Von Moltke v. Gillies*, 332 U. S. 708, 68 S. Ct. 316, 92 L. Ed. 309. The State of Alabama would contend that such cases are not here controlling in view of the fact that each of them deal with prosecutions within the Federal Court, as distinguished from trials within State courts, and each are controlled by the provisions of the Sixth Amendment to the Constitution of the United States rather than by the Fourteenth Amendment. As pointed out by this Court in the case of *Herbert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270:

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this Court to revise the

decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

The Fourteenth Amendment does not say that no state shall deprive any person of liberty without following the "federal" process of law as prescribed for the federal courts in comparable federal cases. It says merely, "nor shall any State deprive any person of life, liberty or property without due process of law; * * * * *." This due process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Bute v. Illinois*, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986.

This Court has decided after exhaustive consideration of the subject that the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. So here, the procedure followed by the State of Alabama in the trial of this cause should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Alabama procedure violates "the very essence of a scheme of ordered liberty" and its continuance would "violate a principle of justice

so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Bute v. Illinois*, supra; *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288; *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903; *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595; *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158; *Herbert v. Louisiana*, supra; *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97; *Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Foster v. Illinois*, 332 U. S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955.

In view of the applicability to the state courts of the Fourteenth Amendment rather than the Sixth Amendment, the federal rules of practice, as stated in Rule 44 of the Federal Rules of Criminal Procedure, cannot be rearded as defining, even by analogy, the minimum requirement of due process for the states under the Fourteenth Amendment. This rule is evidence only of what this Court considers suitable in the federal courts and the states, in their discretion, may or may not follow it. The states are free to determine their own practice as to the assistance of counsel, subject only to the general limitation that such practice shall not deprive the accused of life, liberty or property without due process of law.

Again in the case of *Foster et al v. Illinois*, supra, this Court, after observing the inapplicability of the provisions of the Sixth Amendment to prosecutions in state courts, stated that the "due process of law" which the Fourteenth Amendment exacts from the states is a conception of fundamental justice. But process of law in order to be "due" only requires that a state give a defendant ample opportunity to meet an accusation.

In this case, the Justice preparing the opinion of the Court therein makes reference to the case of *Powell*

v. Alabama, supra, and states that in every case in which the doctrine of such case has been invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement.

We, therefore, respectfully submit that the decisions in the cases of *Glasser v. U. S.*, supra, and *Von Moltke v. Gillies*, supra, should not be here controlling, inasmuch as they deal with the requirements of the Sixth Amendment, whereas we are here concerned with the "due process" requirement of the Fourteenth Amendment. Likewise, each of such cases differ materially from the instant case from a factual standpoint in that the decision in the *Glasser Case* apparently was founded upon the fact that the appointed counsel represented conflicting interest, and, therefore, could not devote his full attention, nor perform his full duty in the interest of the petitioner therein, Glasser, while the latter, the *Von Moltke Case*, concerns itself primarily with the waiver of counsel by the petitioner therein and entry of a plea of guilty to the charges against her. Neither of such propositions are questions of moment in the instant case. It is likewise of interest to note that in its final disposition of the *Von Moltke Case*, this Court remanded same to the District Court for a further hearing in order to determine whether or not there had been an intelligent waiver of counsel. Waiver is in no way involved in the case at bar, this petition having been afforded a full, fair and impartial trial upon the merits of the case.

2. The Constitution and statutes of the State of Alabama recognize the right of an indigent defendant to counsel and require that if a defendant is indicated for a capital offense and is unable to employ counsel, the Court must appoint counsel for him.

Article 1, Section 6 of the Constitution of Alabama 1901, provides, in part, that in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either. Title 15, Section 318, Code of Alabama 1940, provides that:

> "If the defendant is idicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours."

These provisions of law only require that courts shall appoint counsel for a defendant who is indicted for a capital offense and who is himself unable to employ counsel. This has been the extent of the duty enjoined upon the trial courts of this State, with respect to appointment of attorneys for an indigent defendant, since the earliest history of the State. *Gilchrist v. State*, 234 Ala. 73, 173 So. 651. The validity of such constitutional provision and statute is not here attacked and we would respectfully submit that their requirements have been fulfilled in every respect. The Supreme Court of Alabama in its opinion rendered herein has specifically found there to have been no infringement of the rights accorded the defendant under these provisions and we respectfully submit that this should be strongly conclusive in this regard.

,3. Inasmuch as this petitioner strives to bring this particular case within the purview of those principles enunciated by this Court in the case of *Powell v. Alabama*, supra, we deem it well to here point out, as does the Supreme Court of Alabama in its opinion rendered herein, the material differences between this case and the *Powell Case*.

We would be the first to admit that the due process of law required by the Fourteenth Amendment, insofar as it relates to the effective assistance of counsel, is not

satisfied by an appointment amounting to no more than an "empty formality." However, we do earnestly and sincerely insist that the appointment herein does not fall within such category.

It would appear that petitioner seeks to attack as ineffective both his representation upon arraignment and his representation at trial, with particular emphasis on the former. In this regard, reference need again be made to the record in this case. Not wishing to unduly burden this brief with repetitious statements of fact, we wish in this regard to only point out that petitioner was afforded every opportunity to secure counsel of his own choosing. The record in this regard, as well as the opinion of the Supreme Court of Alabama, indicates that within nine days following the perpetration of this homicide, petitioner's family was in touch with the law firm of Beddow and Jones and engaging in consultation with them. This particular law firm is generally recognized throughout the State of Alabama for its ability and aggressiveness in the field of criminal law. Certainly this petitioner could have sought and obtained no better counsel. As the Supreme Court of Alabama states in its opinion, no stone was cast in the way of this law firm accepting employment in this case. Having made an investigation of this case, prior both to arraignment and trial, this law firm did decline to accept employment, presumably for the reason that they did not have time to prepare the case. This decision, however, was not announced until May 31, 1948, following arraignment of this petitioner upon May 22, 1948. It conclusively appears that even until the date of May 31, the trial court was still of the opinion that this particular law firm would participate in this case.

That such was the opinion of the trial court is conclusively shown by the fact that upon the morning of arraignment the trial judge, of his own volition, contacted the law firm of Beddow and Jones by telephone, advising them of the arraignment of this petitioner and inquiring

as to their desires to be present. Being informed that the employment of this particular law firm was only prospective at this time, the trial judge further inquired of Mr. Beddow as to the pleas he would care to enter herein if present and was informed that it would be his desire to enter the identical pleas which were entered, that is, a plea of not guilty and a special plea of not guilty by reason of insanity. No mention whatsoever was made of any plea in abatement, and indeed we must insist that such now comes as an abject afterthought of petitioner's able and resourceful counsel.

We wish to respectfully call the attention of this Court to the further fact that upon arraignment leave was granted this petitioner, by the court, to at any time thereafter withdraw or amend the pleas so entered and to substitute other and different pleas therefor. As we have pointed out, failure to enter pleas in abatement at time of arraignment does not constitute an absolute waiver of such right as petitioner would have us believe, but such pleas subsequently entered address themselves to the sound discretion of the trial court. We respectfully submit that in granting this concession to petitioner to subsequently enter such pleas as he might desire, the trial court exercised this discretion in favor of this petitioner and any failure to subsequently so enter such pleas cannot be attributed to arbitrary acts or conduct upon the part of the Court.

We, therefore, respectfully submit that rather than being deprived of the assistance of counsel upon arraignment, this petitioner was afforded the benefit of additional counsel by the leading law firm of the State of Alabama in the field of criminal law, and likewise the assistance of the trial judge himself who granted leave to petitioner to file any subsequent pleas so desired. All this was afforded this petitioner in addition to the assistance of Mr. Emerson, who was duly appointed and entered for this petitioner the pleas suggested by Mr.

Beddow. It is, therefore, our contention that any allegation that this petitioner was without the benefit and assistance of counsel upon arraignment is not factually sound and does not find support within this record.

Regarding the representation of this petitioner at time of trial, we respectfully submit that any allegation as to the inefficiency or incompetency of the attorney appointed for the defense of this petitioner is without foundation in fact. Such allegation is specifically rebutted by the Supreme Court of Alabama in its opinion herein and it is to be found from the record that the Honorable Hugh Walker, petitioner's appointed counsel, was an attorney of long standing and broad experience in the practice of the law and that upon the trial of this case he did his duty fully, intelligently and well.

It is well to here note that question having been made as to the appointment of Mr. Walker, in that such appointment does not appear upon the minutes of the Circuit Court of Calhoun County, we would respectfully submit that there is no requirement under the laws of this State that such appointment be so entered. The record irrefutably shows the appointment of this attorney upon the early morning of June 1, 1948, and this is sufficient.

In view of the fact that pointed accusations have been levelled at the ability and competency of the appointed counsel, we feel it well to here point out that in order to satisfy the due process of law requirements of the Fourteenth Amendment, as they pertain to assistance of counsel, it is only necessary that the accused be afforded the good faith assistance of a lawyer in defending against the indictment upon which he is put to trial. The Constitution in guaranteeing assistance of counsel does not guarantee assistance of the most brilliant counsel. *Mitchell v. Thompson* 56 Fed. Supp. 683. Neither does the Constitution guarantee that counsel appointed for or employed by an accused shall measure up to his own

standards of ability and competency, and it is enough if the trial court has appointed a qualified attorney to represent the accused and that attorney appeared, advised with and represented him. *Conley v. Cox*, 138 Fed. 2d 786.

Even assuming, as we do not, that certain mistakes were made in the conduct of the defense of this petitioner, we would point out that even under the more rigid requirements of the Sixth Amendment the constitutional rights of an accused are not deemed to have been impaired by counsel's "mistakes" subsequent to proper appointment. *Diggs v. Welch*, 148 Fed. 2d 667, 80 U. S. App. D. C. 5, cert. den. 65 S. Ct. 1576, 325 U. S. 889, 89 L. Ed. 2002. Certainly, it cannot be said that alleged "mistakes" of defense counsel relating to trial tactics might be held to constitute a denial of the assistance of counsel. *Felton v. U. S.* 170 Fed. 2d 153, 83 U. S. App. D. C. 277. See also *Coates v. Lawrence*, supra.

We, therefore, submit that this petitioner has been denied none of the rights guaranteed him by the Fourteenth Amendment, as they pertain to the assistance of counsel, in view of the fact that able and competent counsel was appointed, appeared and represented this petitioner fully and intelligently upon trial. Said appointment was far more than an "empty formality" as spoken of in the Powell Case, supra, and no analogy exists between the two cases.

4. Any allegation upon the part of this petitioner that the attorney appointed for his defense was not afforded all accustomed incidents of consultation and opportunity of preparation for trial, in our judgment, is completely refuted by the opinion of this court in the case of *Avery v. Alabama*, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377. In that case, this Court held to the effect that an accused put to trial three days following indictment and appointment of counsel was not deprived of any of his rights under the Fourteenth Amendment.

That case further points out that such is particularly true, and the fact that adequate time had been permitted for counsel to exhaust every angle of the case is illuminated, by the absence of any indication, on the motion and hearing for new trial, that they would have done more had additional time been granted. We deem this particularly appropos to this case, for as we interpret the insistences of petitioner's present counsel, they are to the effect that had adequate time been given them, they could have produced witnesses or documents pertaining to this petitioner's mental condition while in the service of the United States Army. It is interesting to note that even some months later on motion for new trial, such witnesses or documents had not been located or procured, and we would respectfully submit that petitioner's testimony as found set out on page 97 of the record conclusively shows that such witnesses or documents were not in existence. This testimony to us conclusively shows that had time ad infinitum been granted petitioner's counsel to seek to procure witnesses or documents as to mental ailments of this petitioner contracted while in the service, no such witnesses or documents would ever have been found, for the simple reason that they did not exist, and, therefore, it is small wonder that such did not appear on motion for new trial.

Lastly, and most important, it should be noted that no continuance was requested by petitioner's appointed counsel, and that the only mention found of continuance in this record is that to be found within the testimony concerning an informal conference between the officers of the court and the law firm of Beddow and Jones upon the evening of May 31, 1948, when this particular law firm was considering employment in this case. As pointed out by the Supreme Court of Alabama, such request did not rise to the dignity of a motion for a continuance in view of the simple fact that these lawyers did not purport to represent this petitioner, but were merely considering employment in the case. We sincerely believe this latter

fact, that no request for continuance was made by appointed counsel, completely refutes any allegation of want of time for preparation.

5. In this regard petitioner has failed to avail himself of the means and methods provided by law for attacking the organization and composition of the grand jury which returned the indictment against him. This must be done by plea in abatement before pleading not guilty, or at the very least prior to going to trial on the merits under such plea of not guilty. This was not done, despite the fact that the trial judge had specifically granted leave to this petitioner to file any other and different pleas he so desired from the time of arraignment to the time of trial. Certainly it cannot successfully be argued that such plea in abatement, attacking the organization and composition of the grand jury which returned this indictment on the ground that members of the colored race were systematically excluded therefrom, can be presented on motion for a new trial. No reported cases so hold and in all those cases cited by petitioner in his brief objections were timely and properly raised in the trial court. *Patton v. Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76; *Hill v. Texas*, 316 U. S. 404, 62 S. Ct. 1161, 86 L. Ed. 1559.

6. We would here point out that under the laws of the State of Alabama objections going to the venire of the petit jury or any member thereof must be made before entering upon the trial of the case on its merits under the defendant's plea of not guilty, and failure to make such objection constitutes a waiver. *Peterson v. State*, 227 Ala. 361, 150 So. 156. There are, of course, certain exceptions as when the defense is misled by the false oath and fraud of a venireman and is thereby induced to accept such venireman on the jury.

The reason for such rule is that it is not permissible for a defendant who has not been so misled to participate in the selection of the jurors without objection, speculate

on winning a favorable verdict, and failing to do so raise such question on a motion for a new trial. Such rule is fundamental and sound.

Petitioner's objection here is that he was tried by an all-white petit jury. Certainly this fact was known to him when he entered upon trial and if he had any objection thereto he should have made such then known in the manner required by law. This he did not do, inasmuch as the purported motion to quash filed by petitioner lacked all legal sufficiency and was, by present counsel's own admission, properly stricken on motion by the state.

7. Here petitioner seeks to raise the proposition that a change of venue should have been granted him, alleging that he was tried in an atmosphere of hostility and prejudice, which affected his rights to a fair and impartial trial. Under the Constitution and laws of this State, the State cannot make a motion for a change of venue, such being a right attaching itself to the defendant. *Ex parte Lancaster v. State*, 206 Ala. 60, 89 So. 721, 18 A.L.R. 706. It should be here noted that in this case no motion for a change of venue was made. This is particularly significant in view of the fact that the attorney representing this petitioner upon trial was a long time resident of Calhoun County, having been engaged in the practice of law in the City of Anniston for more than forty years. Certainly if anyone was familiar with local atmosphere and prejudice, this attorney should have been; in fact, far more so than attorneys from a different city and county. The presumption must be that had this attorney of long experience and mature years, and likewise a long time resident of this particular community, felt a change of venue to have been warranted or advisable he would have requested same. *This he did not do.*

It is also of importance to note that this record is entirely barren of any factual support for the contention that such a motion should have been entered. Petitioner's present counsel attach vast significance to certain re-

marks allegedly made by the trial judge and county solicitor prior to the trial in an informal and highly personal conference between these officers and Mr. Beddow and Mr. Jones, but, as stated by the Supreme Court of Alabama, these remarks must be considered in the light of the surroundings and circumstances of their making. They were but the expression of personal opinions, not made in the presence of any juror or prospective juror, and in this regard could not have weighed upon the jury's verdict. Moreover, as pointed out by the Supreme Court of Alabama, so far as the record shows, these opinions were not supported by the facts in the case. The petitioner was incarcerated in the Calhoun County jail from the time he killed Sparks to the time of his trial. So far as this record shows, there were no special guards, officers, or state militia detailed to protect him either before or at the time of his trial. No demonstration or threats at any time are shown to have been made against the prisoner. No bias, prejudice or partiality is attributed to the trial judge in the trial of the cause, and none could be legitimately made on the basis of the record.

8. We have previously pointed out that objections going to the organization or composition of the grand jury and petit jury do not properly fall within the scope of motion for a new trial but should be raised prior to or at time of trial. Despite the fact that such was not here done, we will briefly point out that any such allegation as to systematic discrimination of any persons or races does not find support within the record.

As we have noted, the burden is upon one so alleging such discrimination to establish same. We are fully aware of the fact that this Court has held upon several occasions that where it is shown that for a long period of time the name of no person of the colored race has appeared upon the jury rolls or in the jury box, nor any such persons have in fact served upon either grand or petit juries of the county, a prima facie case of discrimination is made out. With this proposition we are in no

dispute. However, such is not the situation here confronting this Court. The testimony herein is to the effect that there were upon the jury rolls of Calhoun County, and in the jury box of that County, the names of colored persons. The testimony is likewise to the effect that such persons have been called for jury duty and have served upon the juries in and for that county. At best it can be said that the testimony, as it pertains to any systematic discrimination, is in direct conflict, petitioner alleging himself to have made out a prima facie case of discrimination and the testimony of those witnesses called by the State of Alabama refuting such allegation.

We, therefore, deem the opinion of this Court in the case of *Akins v. Texas*, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692, to be particularly applicable to this case. Therein this Court stated.

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of facts who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, Norris v. Alabama, 294 U. S. 587, 589-90; Smith v. Texas, 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state juridicary, Pierre v. Louisiana, 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evi-

dence that to give it effect would work that fundamental unfairness which is at war with due process,' Lisenba v. California, 314 U. S. 219, 238, or equal protection. Cf. Ashcraft v. Tennessee, 322 U. S. 143, 152, 153; Malinski v. New York, 324 U. S. 401, 404."

We feel it important to here point out that in those cases cited by petitioner in brief, that is, *Hill v. Texas*, 316 U. S. 404, 62 S. Ct. 1161, 86 L. Ed. 1559; *Patton v. Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76, and *Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 784, the Court was confronted with a materially different situation as to facts and circumstances from that here prevailing, and in each of such cases objections were timely and properly raised in the trial court.

In the instant case, we would first insist that the objections came too late and certainly, even though they had been properly presented at time of trial, the facts adduced do not warrant sustaining such motions. Even though it be assumed, for the purpose of argument, that petitioner has succeeded in making out a prima facie case of discrimination, we submit that same has been fully rebutted by that testimony introduced upon behalf of the State, and that the conclusion of the trial judge is fully sustained by the evidence. See again *Akins v. Texas*, supra.

In conclusion, we would renew our insistences made earlier herein that the issues in this case are considerably more narrow in scope than the length of this brief, or the record in this proceeding, would indicate. The principal difficulty confronting this Court is to so narrow these issues, separating the pertinent from the non-pertinent matters sought to be raised by this petitioner. We would again insist that all objections pertaining to discrimination in the organization, selection, and composition of the grand and petit juries has not been timely raised. We would again point out that no motion for continuance

was made by appointed counsel nor was there any motion for a change of venue made by such counsel, hence we fail to see how these questions may now be properly considered.

It appears that in its essence, determination of this case hinges upon the question of whether or not this petitioner was afforded effective and competent counsel. In our humble judgment, the record itself is answer enough to this question. It is undisputed that counsel was appointed to defend this petitioner; that he consulted with and procured witnesses and conducted the trial of this petitioner in a highly efficient manner worthy of the highest commendation, and we respectfully submit that the Supreme Court of Alabama was completely correct in its statement, to-wit:

> "That upon the trial of the case lasting two days, he did his full duty, intelligently and well, and insofar as this record shows the results were for the lack of material on which to base a defense rather than the efforts of Mr. Walker. Avery v. State of Alabama, 237 Ala. 616, 60 S. Ct. 321, 308 U. S. 444, 84 L. Ed. 377."

Petitioner now seeks to present as a barrier to his conviction that intangible and oft-times indefinable element of our judicial procedure known as "due process of law." However, it can avail him nothing, for as so aptly stated by this Court in the case of *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, the purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction, and the conviction of this petitioner was fair, just, and fully warranted in every respect.

We, therefore, respectfully submit that the writ should be denied.

Respectfully submitted,

A. A. Carmichael

A. A. CARMICHAEL,
Attorney General of Alabama,
Counsel for Respondent.

JAMES T. HARDIN,
Assistant Attorney General,
On The Brief.

CERTIFICATE

I hereby certify that I have forwarded a copy of the foregoing brief to Hon. G. Ernest Jones, Sr., Massey Building, Birmingham, Alabama, attorney for petitioner, on this the 17 day of March, 1950.

A. A. Carmichael

A. A. CARMICHAEL,
Attorney General of Alabama,
Counsel for Respondent.